United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL B

P/S

74-1856

United States Court of Appeals

FOR THE SECOND CIRCUIT

ERWINE LAVERNE and ESTELLE LAVERNE,

Appellants,

—against—

HOWARD J. CORNING, JR., Mayor; HUTCHINSON DUBOSQUE, Deputy Mayor, Police Commissioner and a Trustee; ORIN LEACH, JOHN MACKAY and DOUGLAS DESPARD, Trustees; HUGH JOHNSON, Building Inspector; and EDWARD J. MEEHAN, Police Sergeant; jointly and severally, and individually and as respective officers as stated of the Incorporated Village of Laurel Hollow,

Appellees.

APPELLANTS' BRIEF ON APPEAL

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STATEMENT OF ISSUES & SUMMARY OF ARGUMENT

In Point I it is argued that the federal trial on the issue of whether the appellee Building Inspector and other public officials acted in good faith when they illegally entered and searched the Lavernes' home for evidence of zoning ordinance violations should never have occurred. Prior to this trial Judge Tenney had granted the Lavernes summary judgment, ruling that good faith and reasonable belief were not a defense to the action. Judge Knapp, without first deciding whether he agreed with Judge Tenney, held a trial on the good faith issue in which the jury found appellees acted in good faith. Judge Knapp then held good faith was a complete defense to the action.

Judge Tenney was correct in his ruling that good faith was not a defense to this action. Defenses to civil rights actions under Section 1983 are determined by looking to the defenses available for the closest analagous tort at common law. The closest analagous tort at common law to searches not made incident to arrests and not made by police officers is the tort of trespass. As is well known, there is no good faith defense to a trespass. This conclusion requires the reversal of this case.

Even once Judge Knapp determined that good faith and reasonable belief were a defense to this action, prior decisions of the New York courts precluded the appellees from proving at trial that they had a reasonable basis in the law existing at the time the searches were instituted for believing them valid.

Every New York court that decided this case determined that the warrantless searches were not administrative inspections authorized under the law existing at the time they occurred, but were made for purposes of gathering evidence for criminal prosecutions. This finding of the New York courts collaterally estopped the appellees from proving the contrary at trial. A matter once determined in the State courts should not have been relitigated in a federal forum. On the basis of these decisions the Lavernes were entitled to judgment as a matter of law. (Pt. II)

In Point III it is argued that the evidence at trial was insufficient to support the jury's verdict that there was a reasonable basis in the law for appellees' beliefs that the searches were valid. That evidence indisputably shows that the searches were not for the administrative purposes

authorized by the existing law, but were undertaken for the purpose of gathering evidence for criminal prosecutions.

Appellees asserted that Section 10.1 of the Building Zone Ordinance authorized the searches of the Lavernes' home. Yet this ordinance only gave authorization to the Building Inspector to engage in warrantless searches. As no other statutory authority gave the Mayor and Deputy Mayor the privilege of engaging in warrantless searches, appellants were entitled to a directed verdict that there was no reasonable basis in law for the warrantless searches of the Laverne home. (Point IV)

Additionally, appellants requested an instruction that this ordinance only authorized the Building Inspector and no other public official to engage in warrantless searches. The Judge refused to give this instruction and the jury was improperly permitted to use the ordinance as a basis for their verdict that the Mayor and Deputy Mayor had a reasonable basis in law for the searches. (Point Vb)

After five hours of deliberations the jury stated they were deadlocked concerning the pertinence to the case of the Building Inspector's inviting an architect along on the first search of the Lavernes' home. The testimony indicated that the architect was invited to see an interesting, historical building. The Judge refused to answer the question. Obviously, the Inspector's invitation to the architect related directly to the issue of whether the Inspector entered the Laverne home for purposes of enforcing the zoning ordinances or for his personal reason of showing a friend an interesting building. Not to answer this question, about which

the jury was deadlocked,was highly prejudicial to appellants and requires a reversal. (Point Va)

Finally, appellants offered evidence as to the appearance and contents of a factory that produced wallpaper, furniture and fabrics. The Judge excluded the evidence as irrelevant. This evidence would have demonstrated that it was unreasonable for appellees to believe that what they saw at appellants' home was such a factory. The jury might have then concluded that there was no basis for the searches. This exclusion of relevant and probative evidence requires a new trial. (Point VI)

PRELIMINARY STATEMENT

This is an appeal from an order of the District Court, Southern District of New York (Knapp, D.J.), dismissing appellants' civil rights action. Laverne v. Corning, 376 F.Supp. 836 (SDNY, 1974) (A. at 111).* The order dismissing the complaint was entered after a jury found that the appellees acted in good faith and with a reasonable belief in the validity of three warrantless searches of appellants' premises in 1962. Judge Knapp found that a good faith, reasonable belief in the validity of these illegal searches was a complete defense.

This finding was contrary to Judge Tenney's earlier finding in this case that a good faith, reasonable belief was not a defense to the illegal searches. Laverne v. Corning, 316 F.Supp. 629 (SDNY, 1970) and 354 F.Supp. 1402 (SDNY, 1972) (A. at 34, 51).

STATEMENT OF THE CASE

A. The Complaint

Appellants, who are well known artists and designers, brought this action pursuant to 42 U.S.C. Section 1983, claiming that various officials of the Village of Laurel Hollow, Nassau County, New York violated their constitutional rights to be free from illegal searches and seizures by

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*All citations to the Appendix will be designated by the letter "A." All citations to the transcript will be designed by the letter "T."

illegally entering and searching their home three times in 1962 (A. at 8). The officials who actually conducted the searches included the Mayor, the Deputy Mayor, and the Building Inspector. Three Trustees of the Village, who authorized at least one of the searches, were also named as defendants.*

Appellants suffered great financial hardship and damages as a result of these searches. They incurred a total of $10,075.00 in legal expenses that were necessary to defend the various actions brought against them as a result of the searches and they have already expended an additional $16,143.48 in costs trying to collect these expenses (A. at 107). The complaint also sought compensation for stress, trauma and emotional distress as well as punitive damages.

B. The State Court Background

Litigation between the Lavernes and the Village of Laurel Hollow began in the early 1950's. The Lavernes had purchased their home in 1949 from the Tiffany Foundation which had converted it into artists' studios (T. at 424). This purchase was one year after the Village's zoning ordinance was passed and the Lavernes contended that the house could continue to be used as it was prior to the passage of the ordinance (A. at 141-42). The Village instituted an injunction action against the Lavernes and in that proceeding it was held that the Lavernes "were

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*Appellants consented to a dismissal of the action against Martin Dwyer, Chairman of the Planning Board.

entitled to make partial use of the premises for their activities as such professional persons," but that they could not operate a business or industry on the premises (A. at 141, 145).

In 1962, eight years after the injunction proceeding, appellee public officials conducted three warrantless searches of the home, allegedly under the authority of an ordinance of the Village of Laurel Hollow. This ordinance authorized the Village Building Inspector to "enter any building or premises at any reasonable hour," in discharging his duty to "enforce the provisions of" the Building Zone Ordinance of the Village (A. at 137). Solely on the basis of information gleaned from these searches the Village instituted a series of criminal and quasi-criminal actions against appellants for violation of the Village zoning ordinance and for violation of the 1954 injunction.

The first of these actions, instituted between the second and third searches, was a criminal prosecution against Erwine Laverne for violating Sections 5.0 and 10.2 of the ordinance which prohibit and make it a criminal offense to conduct a business in a non-business zone (A. at 133, 137). In 1963, after trial before the Police Justice of the Village, Erwine Laverne was convicted on three charges of violating the ordinance and sentenced to a six month suspended jail sentence* (A. at 118).

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*The Lavernes did not defend this criminal action on the merits, but contended only that the searches were illegal (T. 451-52). For this reason the case went directly to the Court of Appeals.

At approximately the same time it instituted the criminal prosecution the Village moved to punish the Lavernes for contempt of the 1954 injunction (T. at 61). Two contempt orders were obtained, imposing fines on the Lavernes and subjecting them to commitment unless the fines were paid.*

Finally, on March 6, 1963, the Village instituted a penalty action against the Lavernes for violation of the ordinance. The Village sought a statutory penalty of $100.00 for each day the ordinance was violated, and sued the appellants for an amount in excess of $750,000.** On the basis of the evidence seized during the three warrantless entries, the Lavernes were found to be guilty of and fined for violating the ordinance on the three specific dates when their premises were searched.***

The first of these actions to reach the New York Court of Appeals was the criminal conviction against Erwine Laverne. People v. Laverne, 14 N. Y. 2d 304 (1964) (A. at 118). The Court of Appeals reversed the conviction holding that the three entries onto the Laverne premises by

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*On December 27, 1962 the appellants were adjudged in contempt and fined $250.00. On April 19, 1963 appellants were again held in contempt, fined an additional $250.00 and $300.00 for legal expenses. See Village of Laurel Hollow v. Laverne, Inc., 43 Misc. 2d 248 (S. Ct. Nassau County, 1964).

**The facts with regard to this penalty action are contained in Village of Laurel Hollow v. Laverne, Inc., 43 Misc. 2d 248 (S. Ct. Nassau County, 1964) and T. at 208-15.

***Incorporated Village of Laurel Hollow v. Laverne, Inc., 24 App. Div. 2d 615 (2d Dept., 1965).

the Building Inspector violated the Fourth Amendment's prohibition against unreasonable searches and seizures. The Court found that the entries were made without consent, against the resistance of the occupants and for the purpose of obtaining evidence for a criminal prosecution (A. at 122-23). It further held that the searches were not authorized by Frank v. Maryland, 359 U.S. 360 (1959) and Eaton v. Price, 364 U.S. 263 (1960) because they were not searches "leading to summary administrative action or civil proceedings to preserve health or public safety" (A. at 122).

On the basis of this decision the judgments of contempt and the judgments for penalties were reversed. The Appellate Division reasoned that the penalty action was quasi-criminal in nature and "involves a punishment for the infraction of a law . . . and is within the constitutional rule excluding evidence unlawfully obtained." Incorporated Village of Laurel Hollow v. Laverne, Inc., 24 App. Div. 2d 615 (2nd Dept., 1965).

Likewise the same Court reasoned that the contempt actions "to punish the individual defendants for violating the law" were quasi-criminal in nature and that the Village could not utilize the evidence unlawfully obtained. Incorporated Village of Laurel Hollow v. Laverne, Inc., 24 App. Div. 2d 616 (2d Dept., 1965).

C. Federal Court Proceedings

The complaint in this civil rights action was filed in 1967. In 1970 appellants moved before Judge Tenney for summary judgment on the

issue of appellees' liability for compensatory damages. The Lavernes claimed the following facts, among others, were established:

1. That on July 24, October 18 and December 17, 1962, one or more of the appellees, acting under color of state law, and purely by force of their power as public authorities searched the Laverne home and took photographs of the interior;

2. That these searches and the photographing were done upon the instruction of the remaining appellees;

3. That the fruits of these searches and seizures were used in subsequent criminal and quasi-criminal actions against the Lavernes; and

4. That all of the actions, were terminated in favor of the Lavernes based upon a determination of the New York Court of Appeals in People v. Laverne, 14 N. Y. 2d 304 (1964) (A. at 118). On the basis of these facts the Lavernes requested the Court to rule as a matter of law that their Fourth Amendment rights had been violated (Motion for Summary Judgment, Filed February 27, 1970).

Appellees opposed the motion and claimed that the searches were lawful when conducted under Frank v. Maryland, 359 U.S. 360 (1959) and further that the ruling of the New York courts should not be binding upon the Federal Court.

Judge Tenney granted the Lavernes' motion for summary judgment on the issue of liability (A. 34). He agreed with the "sound legal conclusion reached by New York's highest tribunal, . . . that the

defendants' unlawful conduct deprived plaintiffs of their right to be free from unconstitutional searches and seizures . . . " (A. at 39). Moreover, Judge Tenney found that the appellants' "conduct amounted to an unconstitutional search and seizure under the judicial authority than existing . . ." and were not authorized by Frank v. Maryland, supra (A. at 39).

Appellees also contended in opposition to the motion for summary judgment that good faith was a defense to their liability and that this presented a factual question which prevented the Court from granting summary judgment. Judge Tenney found that good faith was not a valid defense and, therefore, whether or not it presented issues of fact was irrelevant (A. at 41-42).

Subsequently to the granting of the motion for summary judgment, appellees moved before Judge Tenney to vacate the order on the basis of this Court's decision in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 456 F. 2d 1339 (2d Cir., 1972). In Bivens, a case not involving 42 U.S.C. Section 1983, this Court held that good faith and reasonable belief were a defense to a policeman accused of making an unconstitutional arrest. Judge Tenney found nothing inconsistent in Bivens with his decision in this case; rather, he found that Bivens supported his view that the court should look to the parallel common tort in determining the defenses available to public officials in civil rights actions. As there was no defense at common law for a

trespass, the closest analagous tort to this action, he refused to vacate his earlier decision. Laverne v. Corning, 354 F. Supp. 1402 (SDNY, 1972) (A. at 51).

The case was eventually assigned to Judge Knapp, who without deciding whether Judge Tenney was correct in his ruling that good faith was not a defense, set the case down for trial on the issue of appellees' good faith. On March 9, 1974, after a five-day trial, the jury found that each of the appellees had acted in good faith as that phrase was defined in the Court's charge (T. at 604; A. at 99).

After this jury verdict Judge Knapp re-examined Judge Tenney's decision that good faith was not a defense to the action (A. at 111). On the basis of this decision he dismissed the complaint (A. at 117).

D. The Trial on the Issue of Appellees' Good Faith.

Judge Knapp began the trial by instructing the jury that on July 24, October 18 and December 17, 1962 the appellees under color of official authority entered the residential property of the Lavernes to make searches and inspections (T. at 3). And that the New York courts established that these entries and searches were made without lawful authority (T. at 3).

On the basis of these established facts the Judge ruled that the Lavernes established a prima facie case and that the public officials now had the burden of proving that the acts were done in good faith. Appellants could then proceed to show malice (T. at 21).

1. The First Search

Appellees' first witness, the defendant Hugh G. Johnson, the Building Inspector of Laurel Hollow, was involved in all three searches of the Lavernes' home.

On July 24, 1962 Johnson and an architect friend, not an official of Laurel Hollow, were driving by the Laverne home when he noticed that the gate and door to the house were open (T. at 44-50). As he had not been able to arouse anyone on previous occasions he took the opportunity to enter the Laverne home to see what was going on (T. at 44). Johnson invited his architect friend to enter the Laverne house with him because he felt the architect would be interested in the unusual historical nature of the home (T. at 50).

Johnson believed that Section 10.1 of Article X of the Building Zone Ordinance gave him the right to enter the Lavernes' home, but that the ordinance did not give a right of entry to anyone other than a building inspector (T. at 44-45, 76-77). Therefore, he clearly exceeded his authority in inviting his architect friend into the home. The Ordinance provided:

> Enforcement. It shall be the duty of the Building Inspector, and he hereby is given authority, to enforce the provisions of this ordinance. The Building Inspector in the discharge of his duties shall have authority to enter any building or premises at any reasonable hour. (A. at 137)*

*The Building Zone Ordinance prohibited any use of premises as a business (A. at 133-34), and subjected violators of its provisions to disorderly conduct convictions and fines of $100.00 per day (A. at 136).

Two or three month prior to this search of the Lavernes' home, a neighbor had mentioned to Johnson at a party that he saw routine traffic in the morning at the Lavernes', and wondered whether something was going on that should not be (T. at 27-28, 84). Johnson replied that he had no information (T. at 27-28). Nor did Johnson have any prior complaints prior to his July search (T. at 84, 95), and had no file regarding the Laverne premises (T. at 102). He never asked permission to search the Laverne house; he simply walked in without permission (T. at 72, 74, 82-83). Nor was he familiar with the Court order involved in the 1954 proceeding, but understood that it prohibited the Lavernes from running a factory (T. at 27-28).

As the gate was open, Johnson and the architect walked into the courtyard* (T. at 30, 77). The door to the house was open, Johnson stepped into the foyer and looked into Studio #1 or the vat room (T. at 32). He walked back into the courtyard, looked in through the garage and saw three men about knee deep in water digging for a drain (T. at 31).** As the house was for sale, these men assumed at first that

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*The Laverne home is large, square-shaped, surrounds a courtyard and contains 30 rooms. The gate is approximately 30 feet from the road and the entrance to the home is through an arch about 12 feet wide and 10 to 15 feet deep (T. at 29-30). The walk to the gate is entirely on the Laverne property. The entrance to the house is on the far left past the gateway and inside the courtyard. Outside the home there are only windows (T. at 29-30).

**The men were cleaning up from a flood that had occurred the night before (T. at 44, 88-89).

Johnson was a real estate broker (T. at 53, 336). After Johnson admitted he was the Building Inspector and not the real estate broker Rudy Gorlitz, one of the men, insisted that he leave the property (T. at 42-53).

The remainder of Johnson's testimony regarding this first search concerned what he saw on this occasion.

Johnson described Studio #1 as containing several plastic-lined tanks, tables, chairs, a rack of forms and a rack for storage (T. at 33-34). In the foyer he saw 25 cans of paint, 15 to 20 rolls of paper and 10 to 15 silk-screens (T. at 88-89). He also identified three pictures of the vatroom and foyer which were taken without permission during the third search on December 17, 1962 (T. at 36; A. at 135-37).

Johnson saw no work being done in the rooms; he saw only the three men working on the flood (T. at 88-89).

2. Events Between the First and Second Search.

Upon his return from the search of the Laverne house, Johnson prepared a report and sent it to the Mayor and Trustees of Laurel Hollow (T. at 48; A. at 160). Johnson's report stated that the home was being used in violation of the ordinance but that the operation is "quiet," "completely internal" and that on previous inspections he has seen "no signs of life"* (A. at 160).

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*On cross examination Johnson testified that he was only familiar with that part of the 1954 injunction that made it unlawful to carry on certain activities as a business, but was not (continued next page)

The Mayor, Howard Corning, received this report in July, but felt there was no need for immediate action and that it could wait until the Trustees meeting in September (T. at 119-20). He thought that the report indicated a violation of the village ordinance (T. at 120).

A Trustees meeting was held on September 29, 1962 (T. at 121). The Mayor, Howard Corning, described the discussion concerning the Laverne home at this meeting:

> One problem was the possible violation of the Village local ordinance and then upon receipt of this information from Mr. Platt it looked as if we were faced with a contempt action on the part of Laverne Originals in contempt of the injunction issued in 1954. (T. at 127)

On the basis of this discussion the officials and Trustees voted unanimously to authorize and instruct the Building Inspector and Trustee Hutchinson Dubosque to make another inspection of the Laverne premises (A. at 164).*

As justification for this authorization of the Deputy Mayor to inspect the Lavernes' home, the Mayor stated that he and the Deputy Mayor had

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familiar with that part which specifically allowed the Lavernes to carry on those activities as professional persons (T. at 99). Johnson knew the Lavernes were artists, knew they had a right under the zoning ordinance to have a professional studio in their residence and had never previously seen an industrial design studio (T. at 113-14).

*Authorizing Hutchinson Dubosque, the Deputy Mayor, to inspect the premises was directly contrary to Section 10.1 of the Building Zone Ordinance which only authorized the Building Inspector to inspect residences.

the obligation to enforce the law (T. at 129). The Deputy Mayor stated that because the report indicated there may be an infraction of the law he, as Deputy Mayor,* needed to see the premises (T. at 226, 241).

After the Trustees meeting, and without the Trustees' authority, the Mayor decided to accompany the Building Inspector and the Deputy Mayor on the search and inspection of the Lavernes' home (T. at 129-30). The Mayor testified he was aware of Section 10.1 of the Building Zone Ordinance which authorized only the Building Inspector to inspect, but that

> . . . since it seemed possible that the village ordinance was being ignored, I felt I had the right as the chief executive officer of the village to accompany the Building Inspector. (T. at 189-90)

The Mayor did not know of any provisions permitting him to so inspect; nor did he know if an emergency or danger to health existed on the Laverne premises (T. at 191).

Finally, in order to identity the officials involved in the inspection the Mayor requested Sergeant Meehan to join them (T. at 130).

At no time prior to the second inspection on October 18, 1962 was there any contact with the Lavernes or were they asked to permit an inspection (T. at 98, 182, 240).

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*The Deputy Mayor testified that he entered as Deputy Mayor and not as Police Commissioner (T. at 241). There was nothing in the ordinances permitting the police or police commissioner to enter premises for a possible violation of the Building Zone Ordinance (T. at 269). Obviously, a search by a police officer could never be justified as legal under Frank v. Maryland, supra.

3. The Second Search of October 18, 1962.

On October 18, 1962 the Mayor, Deputy Mayor, Building Inspector and Sergeant Meehan met at the Laverne property (T. at 55). The Mayor and Deputy Mayor arrived in the police car along with the Sergeant who was in uniform with his gun showing (T. at 141, 145-46). They went to the gate, knocked, shouted, and received no reply (T. at 56). The Building Inspector went to a window and rapped on glass with a piece of wood at which point Rudy Gorlitz came to the window (T. at 56). The Building Inspector said he had the Mayor with him and that he would like to talk with him (T. at 56). The Mayor asked Rudy if they could inspect the premises and Rudy said he would have to call his boss and unlocked the gate (T. at 57).

Rudy testified that he informed the group he had orders not to let anyone in and when he opened the gate they brushed past him (T. at 342).

Rudy telephoned the Lavernes from Studio #1 and meanwhile the Deputy Mayor took photographs (T. at 58, 135, 223). The Mayor testified that he was very curious to observe as much as he could (T. at 134). The Building Inspector went into and inspected the foyer (T. at 105-07).

The Mayor was informed by Mrs. Laverne that he had no business inspecting the property and should leave (T. at 136, 416). The Mayor did not leave immediately, but spent approximately 10 minutes inspecting the premises (T. at 193). He felt that he should look for some of the

things the Building Inspector had described (T. at 136, 193-94).

4. Events Between the Second and Third Searches.

Within four days of the October 18, 1962 inspection the Trustees, Mayor and Deputy Mayor held another Village Board meeting at which Mayor Corning made a report to the Board on the inspection of the Laverne premises (T. at 153-56; A. at 167-68). The Board unanimously requested the Village Attorney "to seek an order punishing the defendants in the Laverne case for contempt" (T. at 156; A. at 166).

Approximately three weeks after the October 18th search the Building Inspector, at the request of the Village Attorney, signed criminal informations at the local Police Justice's (T. at 61-62; 72-73).* He gave a complete description of what he saw at the Lavernes'** (T. at 62). On November 14, 1962, the Building Inspector signed affidavits used in the contempt proceedings against the Lavernes*** (T. at 73).

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*The Mayor authorized the Village Attorney to begin proceedings for violation of the ordinances before the Police Justice (T. at 165-68).

**These informations eventually resulted in the convictions of Erwine Laverne which were reversed by the Court of Appeals in People v. Laverne, supra.

***The inspector indicated in these affidavits that he had permission to search the Lavernes' home (T. at 73). On cross-examination he admitted that he had no permission (T. at 74).

On December 3, 1962 another Board Meeting was held at which the Mayor and the Village Attorney requested permission to engage an outside law firm to assist in the prosecution of the Lavernes for contempt (A. at 175).

Between this Board Meeting and the next search the Village obtained an order holding the Lavernes in contempt (T. at 62-63, 164).

5. The Third Search of December 17, 1962.

On the eve of December 16, 1962 the Village Attorney called the Building Inspector and said that the Court found against the Lavernes and that they were to stop what they were doing (T. at 62-63). The Village Attorney told the Building Inspector he should make an inspection and see they had done so.

On December 17th the inspector blew his car horn into the archway and walked around the house and knocked until he got Rudy's attention (T. at 62-65). When Rudy came to the door he told him of the Court order and took pictures of the inside of the house (T. at 65).* Rudy telephoned Mrs. Laverne. She told the inspector to leave and he replied he would come back on a daily basis (T. at 65).

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*It is these pictures which constitute Exhibits C-1, C-2, C-3 and E (A. at 154).

6. Events Subsequent to the Third Search.

On the basis of the information from this third search the Village began a second contempt proceeding and instituted a third criminal prosecution (T. at 165-68; People v. Laverne, supra at 306).

On February 26, 1963 the Village Attorney reported to the Board of Trustees that Mr. Laverne had "represented to the Nassau County Supreme Court that he was removing all of the offending materials and equipment from the premises" (T. at 171; A. at 184-85). He also, informed the Board that the Lavernes were going to press their lawsuit against the Village and its officers.

Despite Laverne's representations to the Court, the Board of Trustees unanimously voted to sue the Lavernes for penalties in excess of $750,000. The Mayor testified that he had no information as to whether the Lavernes were violating the ordinance or injunction during the years 1954 to 1961 (T. at 212-15).

7. The Expert Testimony.

Professor Norman Dorsen testified as an expert witness on behalf of the appellees (T. at 280). On the basis of the facts as appelles' lawyer "alluded to them in the case,"* he said there was a "reasonable ground for belief that the entries were lawful at the time they took place in 1962" (T. at 294).

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*And not necessarily as they turned out to be at trial or as the New York Court of Appeals found them to be.

Professor Dorsen also admitted under cross examination that the New York Court of Appeals had found the searches to be illegal because carried out for the purpose of gathering evidence for criminal prosecutions (T. at 302-03). And that searches for that purpose were not authorized by Frank v. Maryland, supra (T. at 302-03).

Finally, he stated that the architect who entered with the Building Inspector on the first visit would be a trespasser (T. at 304).

Appellees rested at the conclusion of Professor Dorsen's testimony.

8. Appellants' Case.

Appellant Erwine Laverne testified that he has been an artist and designer since 14 years old, has won over 30 international awards and that his work is in numerous museums (T. at 422-23).

At his home he only did art and design work. Paper would be laid out on tables; he would draw and sketch designs for fabrics, furniture and sculpture (T. at 426). The silk screens at the house were not production screens, but would be used only for his design work (T. at 427).

At his home he had one tube of every color in oil, one can of every color in screen paint, one of every color paper and various inks, materials, and clay. None of these materials were used for manufacturing in 1962 or from 1954 to 1961 (T. at 436).

Appellant never used any of the items pictured in Exhibits C-1, C-2, C-3 or E for the manufacture of any products (T. 430-32). At most he

used these items for making Christmas cards and his personal design work (T. at 430-32).

In 1962 appellant owned and still owns a business for the manufacture of furniture and wall coverings (T. at 432). This business had a three floor, 35,000 square foot, factory in Long Island City (T. at 433).

At this point the Judge excluded as irrelevant any evidence as to what a factory for the manufacture of wallpaper and furniture contained (T. at 433). Appellant argued that such evidence would demonstrate that had the appellees acted reasonably they would have known the difference between a studio, which the Lavernes had at home, and a factory (T. at 433).

Estelle Laverne testified that she is an artist and designer who has won 20 or 25 awards. She, like her husband, used the house as an art studio where she did painting, drawing, designing, sculpture, textiles and lithographs (T. at 410). She had ink, brushes, paint, crayons and other materials at the house, but from 1954 through 1962 she never used any of them for manufacturing or the sale of products.

There were long tables in the house because her design work involved continuous patterns and she had to repeat many of the same unit to get the effect (T. at 410). But these tables were never used for manufacturing (T. at 410).

9. Motions, Charge and Verdict.

Appellees moved for a directed veridct as to the presence of good faith and lack of malice and for a dismissal of the entire case (T. at

458-59). The court reserved decision.

Appellant moved for a directed verdict as to the lack of good faith and the presence of malice. This motion was denied (T. at 459).

The jury was given a special verdict sheet which contained three questions to be answered regarding each appellee (Court Exhbit #2; A. at 105). After approximately five hours of deliberation the jury returned with the following question:

> The fact that the building inspector invited the architect to go on the premises and failed to identify himself as soon as possible, is this pertinent to the decision. (A. at 95).

Ten minutes after this question was asked they returned with a verdict (A. at 99).

The jury found unaminously that all of the appellees were acting in good faith and as a result did not bother with the questions that concerned malice (A. at 99).

10. Proceedings after Verdict.

In an opinion dated May 21, 1974 Judge Knapp, contrary to Judge Tenney, found that good faith was a complete defense to appellants' cause of action and dismissed the complaint (A. at 111).

ARGUMENT

POINT I

UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. SECTION 1983, APPELLEE PUBLIC OFFICIALS WHO CONDUCTED UNCONSTITUTIONAL WARRANTLESS SEARCHES OF APPELLANTS' HOME, NOT INCIDENT TO AN ARREST, CANNOT ASSERT IN DEFENSE TO LIABILITY THEIR GOOD FAITH AND REASONABLE BELIEF THAT THE SEARCHES WERE LAWFUL AND REASONABLE.

The novel issue presented by this case is whether under the Civil Rights Act, 42 U.S.C. Section 1983,* appellee public officials who conducted unconstitutional warrantless searches of appellants' home, can assert in defense to liability their good faith and reasonable belief that the searches were lawful and reasonable.**

The issue is novel in two respects. First, this case concerns only an illegal warrantless search and not a search incident to an arrest. Most other Fourth Amendment cases under the Civil Rights Act that permitted a good faith reasonable belief defense concerned searches conducted incident to arrests.*** In fact, the public officials who searched the La-

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*Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress.

**The jury found the searches to have been conducted in good faith and with reasonable belief in their validity. The question still remains whether these findings are a complete defense to this action.

***E.g., Hill v. Rowland, 474 F.2d 1374 (4th Cir., 1973).

verne home did not have the police power to make arrests.* Thus, in this case, the parallel common law tort that is looked to in determining the defenses available to state officials sued under the Civil Rights Act is not the tort of false arrest, but rather the tort of trespass.** As is well known, there is no good faith defense for trespass.***

Secondly, as the public officials who conducted the searches were not police officers, the policy reasons which mandate that police officers can assert the defense of good faith in false arrest cases are not present here.

But for the two District Court Judges who came to opposite conclusions in this case, no other court, to counsel's knowledge, has decided this question.

Judge Tenney, in granting appellants summary judgment, held that good faith and reasonable belief were not a defense to this action (A. at 41-42). He found that the closest analagous tort to this action at common law was trespass and that neither public officials nor anyone else could assert a good faith reasonable belief defense to an action of trespass (A. at 41-42).

Later, when requested to reconsider this ruling after this Court's decision in Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, supra, Judge Tenney found nothing in that case, which con-

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*N.Y. Criminal Procedure Law, Section 1.20 (McKinney's 1971).

**Cf. Pierson v. Ray, 386 U.S. 547 (1967); Whirl v. Kern, 407 F.2d 781 (5th Cir., 1968).

***Restat., Torts, 2d Section 164 (1965).

cerned an arrest and search incident to that arrest, disagreeing with his earlier decision. Laverne v. Corning, supra at 1404 (A. at 54).

Judge Knapp was in agreement with the principles Judge Tenney relied upon:

> All parties are in agreement that Bivens and the other pertinent authorities stand for the proposition that good faith should be permitted as a defense to a civil rights action if that defense could have been asserted in the most analagous tort action at common law. The sole disagreement is whether good faith could have been asserted in the closest analogue at common law to the instant action -- namely, an action in trespass.
>
> (A. at 115)

However, he found, disagreeing with Judge Tenney, that although private citizens at common law did not have a good faith defense to a trespass, public officials did (A. at 115-16).*

An analysis of the cases that established the principles upon which both Judges relied clearly reveal that the public officials in this case who illegally searched appellants' home are absolutely liable for these trespasses.**

The analysis begins with Monroe v. Pape, 365 U.S. 167 (1961), in which plaintiffs alleged that thirteen Chicago police officers broke into their home, illegally arrested them and searched the entire premises.

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*The two cases relied upon by Judge Knapp for this distinction between the defenses available a private citizen and a public official are totally inapposite. See discussion infra.

**Absolute liability has been found in a number of cases brought under the Civil Rights Act. e.g., Whirl v. Kern, supra; Dupree v. Chatanooga, 362 F.Supp. 1136 (E.D.Tenn., 1973).

The Supreme Court held that Section 1983

> . . . should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.
> (Id. at 187)

Pierson v. Ray, supra, decided six years after Monroe v. Pape, supra, expanded on what the Court meant by its holding that Section 1983 should be read "against the background of tort liability."

In Pierson, the Supreme Court held that "the defense which the Court of Appeals found available at common law for false arrest is available in Section 1983" actions. The Court repeated its statement from Monroe v. Pape that Section 1983 should be read "against the background of tort liability,"* and went on to say that:

> . . . part of the background of tort liability in the case of police officers making an arrest, is the defense of good faith and probable cause.
> (Id. at 556; emphasis added)

This holding of the Supreme Court, that the defenses available to an officer sued under Section 1983 are the same as those available for the cognate tort under the common law, is substantiated by the cases that have been decided since Pierson v. Ray, supra. See, e.g., Jenkins v. Averett, 424 F.2d 1228 (4th Cir., 1970); Whirl v. Kern, supra; Jenkins

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*The Supreme Court looked to the analagous common law tort and the defenses to that tort available in the state where the officers' conduct took place (Id. at 555). For the Court relied upon the Court of Appeals' finding that a police officer sued in Mississippi had a good faith defense to the common law tort of false arrest. This holding is logical because a policeman would act in reliance on the law of the state where the arrest was made. In this case whether we look to the common law of New York or the prevailing common law in the United States is academic. The defenses available are the same.

v. Meyers, 338 F.Supp. 383 (N.D.Ill., 1972).

For example, in Whirl v. Kern, supra a prisoner sued a sheriff under Section 1983 for false imprisonment. In finding that the warden's innocence or good faith would not be a defense to the civil rights action because such innocence was not a defense at common law for the cognate tort of false imprisonment, Id. at 790-93, the Court, in language particularly appropriate to this case, stated:

> We do not read Pierson v. Ray as mandating otherwise. The instruction that Section 1983 is to be read against the background of tort liability does not seem to us a directive that "good faith" is a defense to all actions under the Civil Rights Act. Rather Pierson impressed the common law of torts into the service of the Civil Rights Act, and thereby made "good faith" a defense to a suit under Section 1983 only where it is also a defense "under the prevailing view of tort law in this country.
>
> (386 U.S. at 555)

Likewise the cases of Jenkins v. Averett, supra and Jenkins v. Meyers, supra held that good faith was only a defense to a Section 1983 action when that defense could have been asserted to the cognate tort at common law.*

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*In Jenkins v. Meyers, supra a prisoner sued a warden under Section 1983 for failing to mail a trial transcript to his lawyer. The Court found that the warden's innocence of the illegality of the act would only be a defense to the civil rights action if such innocence were a defense to the cognate tort at common law. Id. at 388. The Court held that " . . . Section 1983 was meant to apply only to conscious intended acts even under circumstances where there is a total innocence as to the constitutionality violative nature of the act result except where that innocence would be a common law tort defense such as good faith in false arrest cases (Id. at 388). And in the Fourth Circuit case of Jenkins v. Averett, supra, the plaintiff sued a policeman under Section 1983 alleging that he had without cause been shot by a police officer. The Court held that under Pierson v. Ray, only those defenses to civil rights action continue to exist "where they existed in parallel common law causes of action" (Id. at 1233).

Thus, in deciding the issue of whether the appellees could assert a good faith defense, two issues must be resolved. It must be determined, first what the closest analagous tort at common law is to this action and second, whether a good faith defense was available for that tort at common law. There can be no dispute about the resolution of both these issues. The closest analagous tort at common law to this action is trespass, and at common law there was no good faith defense to that tort.

In the instant case both district court Judges and the parties agreed that the closest analagous tort to a Fourth Amendment action for an illegal search, not incident to an arrest, is the common law tort of trespass.* A trespass on land is defined as:

> . . . an intentional intrusion without the consent of the possessor and without a privilege confereed by law irrespectful of the possessor's consent. (1 Harper & James, The Law of Torts, Section 1.11)

Clearly, the first element of this definition is present here; the appellees intended to enter upon the appellants' land.** It is not necessary

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*Judge Knapp found that "the sole disagreement is whether good faith could have been asserted in the closest analogue at common law to the instant action -- namely, an action in trespass" (A. at 115). Judge Tenney found "that the closest analogy to the defendants' conduct is a trespass . . . " (A. at 42). The New York cases hold that the searches in this case are trespasses; e.g., People v. Defore, 242 N.Y. 13, 19 (1926); People v. Adams, 176 N.Y. 351, 357 (1903), aff'd 192 U.S. 585 (1904).

**Appellee Trustees who authorized the searches are joint trespassers. A joint trespasser is anyone who encourages, commands or directs another to commit a trespass. C.J.S., Trespass, Section 2.

that the appellees "intend to invade the possessor's interest in the exclusive possession of his land." Restat. Torts 2d., Section 5, 158, 164(a); 1 Harper & James, supra at Section 1.4. Nor did the appellees have appellants' consent.*

However, appellees did claim that they entered appellants' land under the authority of Section 10.1 of the Building Zone Ordinance of Laurel Hollow which permitted the Building Inspector "to enter any building or premises at any reasonable hour . . . " (A. at 137).** Public officials who enter land under such a "privilege" are not trespassers.***

Assuming appellees were properly acting under such a privilege, the critical question still remains as to whether appellees are liable as trespassers if the privilege is held invalid as it was in this instance.****

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*T. at 74, 469; People v. Laverne, 14 N.Y.2d, supra (A. at 118).

**For the purpose of this argument it will be assumed that the Mayor and Deputy Mayor could enter under this provision of the Building Zone Ordinance. However, this is not the case as is discussed in Point IV, infra. They had absolutely no authority to enter under this or any other provision. It is also assumed that appellees, in fact, entered the land on the basis of the ordinance.

***As stated in Harper and James, supra, at Section 1.20: "There are many situations in which police, inspectors, commissioners and other administrative officials and, in some instances, private citizens are charged with certain duties and given authority, usually by statute, for the performance of acts which necessitate entry onto private premises. . . . It is not to be supposed that the legislators would require or authorize the doing of acts by public officials and others if their performance would make the official liable as a trespasser."

****Again it is assumed only for purposes of this argument that appellees had a good faith, reasonable belief in the validity of the privilege.

Judge Knapp fails to address this question when he finds that "an action in trespass did not lie against a public official at all at common law because such officials were then cloaked with at least a qualified privilege"* (A. at 115).

More to the point and dispositive of this issue, is the view of every commentator and all of the cases that when the privilege is held invalid, the public official has no defense and is liable as a trespasser. 1 Harper & James, supra at Section 1.4; Restat. 2d, Torts, Section 164. There is no defense despite the public officials' reasonable belief that the statute is valid. Restat. 2d, Torts, Section 164. And the official is liable in trespass even if the statute expressly confers the privilege upon him and is subsequently declared unconstitutional:

> Indeed, even though a statute expressly confers title upon him, he takes the risk that the statute may thereafter be declared unconstitutional.
> (Restat. 2d, Torts, Section 164, Comment (a); Emphasis added)

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*Appellants do not dispute this statement to the extent that the privilege of the public official is found to be valid. In both cases relied upon by Judge Knapp the validity of the privilege is assumed. Edward v. Law, 63 App. Div. 451 (2d Dept., 1901) concerned the entry onto plaintiffs' land by a civil engineer employed by New York City under a statute that provided him a privilege to enter the land to make a survey. The only question in the case was whether he abused his authority under the statute and not the validity of the statute. Remington v. State of New York, 116 App. Div. 522 (3rd Dept., 1906) concerns the entry onto plaintiff's land by the State under a provision that allowed the State to run a fishery. The Court found that even if the State had legislative authority it would be liable in damages if it constructed the fishery on plaintiff's land by mistake. Finally, the Judge's citation to Section 1.20 of 1 Harper and James, supra, only stands for the proposition that a public authority with privilege to enter land will not be liable as a trespasser. However, public officials are liable under a privilege that is held invalid. 1 Harper and James, supra at Section 1.4.

The Harper and James treatise agrees with the view that a public official despite his reasonable belief in a privilege is liable as a trespasser and has no defense if that privilege fails. 1 Harper & James, supra at Section 1.4

Likewise, when Judge Tenney examined the case law he concluded that appellee public officials could not at common law assert a good faith reasonable belief defense to the cognate tort of trespass. He held that

> . . . "good faith" would not be an available defense under the common law of this State. O'Horo v. Kelsey, 60 App. Div. 604, 70 N.Y.S. 14, 18 (1901).*
> (Laverne v. Corning, 316 F.Supp., supra at 636; Footnote added)

Numerous other cases support this proposition.**

Thus, an examination of the parallel common law tort to the instant civil rights action demonstrates that neither a private citizen nor a public official could assert as a defense to trespass his good faith, reasonable belief in the validity of his actions.

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*As is obvious from the citations to the two treatises, the prevailing view in this country, in fact the only view, is that there is no reasonable belief defense to a trespass. Thus, it makes no difference whether we examine the law of New York or the law in the United States.

**First, are there cases in which a private person does not intend to trespass, but is held liable. Socony Vacuum Oil Co. v. Bailey, 202 Misc. 2d 364 (Sup.Ct., 1952); O'Horo v. Kelsey, supra at 608. Nor is the situation treated differently when the trespasser acts pursuant to authority given to him by the State: Nance v. Town of Oyster Bay, 244 N.Y.S.2d 916 (1963); South Carolina Natural Gas Co. v. Phillips, 289 F.2d 143 (4th Cir., 1951). Public officials are similarly treated as absolutely liable. In Baggett v. Linder, 208 Ga. 590, 68 S.E.2d 469 (S.Ct., 1952), plaintiff sued various state officials in trespass who closed his horse farm for health reasons. The plaintiff claimed the statute under which the closing was made was unconstitutional. The Court found that: "If the statute and regulations attacked by the plaintiff's petition as being unconstitutional be void, as alleged, and the quarantine notice was (continued next page)

This Court's decision in Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, supra, does not dictate a different result, either in terms of the law it established or the policies it set forth

Bivens, a damage suit brought directly under the Fourth Amendment and not the Civil Rights Act,* involved an illegal arrest and search by federal police officers looking for suspected narcotics violators. Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 389 (1971). This Circuit held that such federal police officers could assert as a defense their good faith, reasonable belief in the validity of the arrest

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posted and the plaintiff's place of business closed for the purpose alleged in the petition, then the acts of the defendants in going upon the place of plaintiff's premises and closing his place of business would constitute a trespass." Id. at S.E. 471. And in Webster v. White, 8 S.D. 479 (Sup.Ct., 1896), plaintiff sued various town commissioners personally in trespass for damages because of a town road that he claimed traversed his land. The commissioners claimed that the road had been properly placed based on a correct survey by the town superveyor. The Court found, in what was a close case, that the survey was incorrect. The town commissioners were held personally liable for the trespasses. See also, Mulligan v. Martin, 125 Mo.A. 630, 102 S.W. 59 (1907); Loe v. Whitman, 107 So.2d 536 (Ct. of Ap. La., 1958).

**Whether a federal suit is brought pursuant to the Civil Rights Act against a state official or directly under the Fourth Amendment against a federal official may dictate a different result with regard to the defenses available to an official. The Civil Rights Act was passed because of persistent denial of citizens' constitutional rights by state officials. It was ameliorative in purpose and granted an affirmative cause of action to those whose rights were denied. Moreover, as the Court said in Monroe v. Pape, supra, Congress intended that the Act should be read against the background of common law tort liability. No such affirmative or ameliorative policy exists with regard to the Fourth Amendment. The amendment is prohibitory in nature and there is no statement of congressional intent requiring that defenses available to officials sued under it be determined against the background of tort liability.

and subsequent search. Bivens, 456 F.2d, supra at 1348.

The Court adopted the approach set forth in Pierson v. Ray, supra and looked to the cognate common law tort of false arrest in determining that police officers could assert a defense to the action. Bivens, 456 F.2d, supra at 1347. The Court relied upon the same treatises, Harper & James, supra and the Restatement, supra which appellants rely upon for the proposition that good faith is not a defense to a trespass. Id. at 1347. However, the Court only looked to the defenses available for the common law tort of false arrest apparently assuming that searches incident to such arrests were governed by the same rule.* The Court did not address itself to the issue of the defenses available to a non-police officer sued under the Civil Rights Act for trespass.

This difference in the defenses allowed to policemen making arrests and searches and public officials who supposedly engage in searches solely for administrative reasons is grounded in sensible considerations of policy.

Almost every court, including this one, that has found policemen have a good faith defense to false arrest have deemed such a defense necessary because policemen live in constant danger and that

> . . . an arrest is often a stressful and unstable situation calling for discretion, speed, and on the

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*The Court cited Restat., Torts 2d., Section 121(b) (1965) which deals with arrests by police officers as does the other citation, 1 Harper & James, The Law of Torts, 3.18 at 277 (1956).

spot evaluation.
(Whirl v. Kern, supra at 790).

See also, Hill v. Rowland, 474 F.2d 1374, 1378 (4th Cir., 1973); Richardson v. Snow, 340 F.Supp. 1261, 1266 (D.Mo., 1972); Bivens, 456 F.2d, supra at 1347.*

This necessity for quick action and the danger faced by a policeman each day are not present in situations involving administrative searches by building inspectors. The lack of necessity for quick action on the part of building inspectors is apparent from the facts in this case. The building inspector testified that he first heard a "complaint" regarding the Lavernes in the Spring of 1962, but did not search the house until some three months later (T. at 84). And after this initial search in July, the Mayor received the inspector's report, but felt there was "no need for immediate action."

This lack of necessity for quick action gives building inspectors options, such as applying to a court, that are not usually available to policemen. For this reason when a building inspector acts upon his own view of the law, no matter how reasonable he should be held to act at his peril.**

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*The cases that ostensibly support a good faith, reasonable belief defense to a civil rights action, upon analysis, only support such a defense if the cognate parallel common-law action tort provided such a defense. Most cases, like Bivens, involved the parallel common law tort of false arrest and not trespass, e.g., Hill v. Rowland, supra.

**Tucker v. Maher, 497 F.2d 1309 (2d Cir., 1974) does not stand for a contrary proposition. Tucker involved a Section 1983 action against a sheriff and various private parties for an allegedly (continued next page)

In fact, Judge Knapp instructed the jury that the appellees had options which they did not take:

> They could have gone to a Court of Equity and asked to enforce that previous decree and they could have gone to a Magistrate or some judicial house and asked for a warrant. We wouldn't have been here if they had.
>
> (A. at 90-91)

Moreover, a building inspector is not a police officer, does not carry a gun and does not make an arrest. He is not responsible for general enforcement of the criminal law and is not subject to the same dangers as policemen. Society's reasons for granting a good faith, reasonable belief defense to a police officer for his violation of the Constitution are substantial. No such reasons exist for granting that defense to a building

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unconstitutional attachment. The Court held the sheriff, as a peace officer, was not charged with predicting the future course of constitutional law. However, the sheriff, as the Court stated was performing a totally ministerial function and had simply served on the Town Clerk a writ of attachment that was valid on its face. Id. at 313. This is quite unlike the situation in this case where appellees were not performing a totally ministerial function and where they had no writ that was facially valid. Moreover, the Court incorrectly assumed that if a police officer could assert a good faith defense to an unconstitutional warrantless arrest, a fortiori, a sheriff could assert such a defense to an attachment. Id. at 133. But as is discussed supra, this does not follow. A police officer is given that protection because of the speed and danger with which his job is performed; no such speed or danger exists for state officials not involved in enforcement of the criminal law.

Finally, the Court's treatment of the private defendants is much more relevant to this case. The private defendants acted on the basis of what they claimed was a valid attachment statute. Like appellees, they had discretion as to whether or not to act under the statute. The Court determined their liability by looking at the defenses available for the cognate tort at common law. This tort, malicious prosecution, required an improper motive at common law. Id. at 1315. Reliance on a statute later found unconstitutional cannot be equated with such improper motive and, therefore, the Court found them not liable. Id. at 1316.

inspector.

Finally, as a result of appellees' illegal conduct appellants incurred a total of $10,075.00 in legal expenses that were necessary to defend the various actions brought against them (Offer of Proof on Damages, A. at 107). Appellants expended an additional $16,143.48 in attorneys' fees trying to collect these costs. And there is the additional compensation for stress, trauma and emotional distress caused by these proceedings.

These appellants, who had their constitutional rights violated by appellees, should not be the ones to bear the entire financial burden. It seems fitting that appellees, who could have gotten a court order to conduct these searches, should be responsible for these damages.

This Court should not make another exception to the strict liability imposed upon the appellees by the Civil Rights Act. Rather, the decision of Judge Tenney holding appellees liable for the consequences of their actions should be upheld.

POINT II

PRIOR JUDGMENTS OF THE NEW YORK COURTS PRECLUDED APPELLEES FROM PROVING AT TRIAL THAT THEIR GOOD FAITH BELIEF WAS REASONABLY BASED UPON THE STATE OF THE LAW AT THE TIME OF THE SEARCHES.

Perhaps the most surprising aspect of this case is that appellees were permitted to relitigate in a federal forum an issue that had been foreclosed by numerous decisions in the State of New York. This issue, decided by the jury in appellees' favor, was whether the appellees' good faith belief in the legality of the searches "was reasonably based upon the state of the law in effect at the time their actions took place" Preston v. Cowan, 369 F. Supp. 14, 20 (W. D. Ky., 1973) (emphasis added). Every New York Court which ruled in this case determined to the contrary that appellees' actions violated the law in effect at the time the searches took place. See, e.g., People v. Laverne, supra at 307-08.

This issue, proof of which was the cornerstone of appellees' defense at trial, arose in the following context. Judge Tenney had granted the Lavernes summary judgment on the issue of appellees' liability for the searches;* the issue left to be determined was the amount of compen-

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*One of the legal arguments appellants made before Judge Tenney was that the decisions of the New York courts were res judicata with regard to appellees' liability. (Plaintiffs' memorandum in support of motion for summary judgment, Point II, Filed February 27, 1970).

satory damages (A. at 34, 46).*

The case was then assigned to Judge Knapp, who contrary to Judge Tenney's ruling, set the case down for trial on both tht issue of liability and compensatory damages.**

Trial opened with the Judge's instruction to the jury that appellants had made out a prima facie case that the three entries were made illegally and that appellees had the burden of proving good faith (T. at 3, 21). In charging the jury the judge stated that it would be a defense to this action if the jury found that appellees acted with a good faith and reasonable belief in the validity of the searches (A. at 571).***

The instructions given by the court as to the good faith defense were taken from this Court's decision in Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, supra. In Bivens this Court held that it was a defense for a federal police officer sued under the Fourth Amendment "to allege and prove his good faith and reasonable belief that the arrest and search were lawful and reasonable." Id. at 1347. This defense is composed of both subjective and objective elements.

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*The issue of malice and punitive damages were, also, undecided at this point.

**At the time Judge Knapp set the case down for trial, the law of the case was that appellees were liable and had no defense to the action (A. at 46, 51). It is difficult to understand how he justified a five day trial upon the mere chance that after the trial he would determine that the appellees had a defense to the action.

***Prior to the instructions to the jury appellants moved for a directed verdict as to the appellees' failure to meet their burden of proving good faith (T. at 458). This motion was denied (T. at 458).

A police officer must not only prove his good faith belief that his conduct was lawful, but also that this belief is reasonable (Id. at 1348).

This reasonable belief in the lawfulness of his actions is proven by demonstrating

> . . . that their [the officers'] belief was reasonably based upon the state of the law in effect at the time their actions took place. Preston v. Cowan, supra at 20.

Or as held in Haines v. Kerner, 492 F.2d 937 (7th Cir., 1974), the good faith of a defendant official in a damage action brought under 42 U.S.C. Section 1983

> . . . should be tested against constitutional doctrine, as described in prevailing judicial decisions at the time of their action. Id. at 941.

See also, e.g., Pierson v. Ray, 386 U.S. 547 (1967); Adams v. Carlson, 488 F.2d 619, 629 n.16 (7th Cir., 1973); and Jannetta v. Cole, 493 F.2d 1334 (4th Cir., 1974); Duncan v. Nelson, 466 F.2d 939 (7th Cir., 1972).*

Thus, appellees' burden was to establish that the warrantless searches they conducted of the Lavernes' home were constitutionally permissible at the time they were conducted.

To meet this burden appellees claimed that the searches were conducted under the authority of the narrow exception to the warrant

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*Appellee officials are "presumed to have known the then existing law . . . " Duncan v. Nelson, supra at 942.

clause carved out by Frank v. Maryland, supra, and Eaton v. Price, supra, which authorized certain types of warrantless administrative searches and that it was not until Camara v. Municipal Court, 387 U.S. 523 (1967) that such administrative searches were found to be illegal (T. at 285).

However, appellees should not have been permitted to prove this at trial or at a minimum appellants were entitled to a directed verdict on this issue. The issue had already been determined in prior litigation in the New York courts and appellees were collaterally estopped from relitigating it.

Every New York Court that ruled on the constitutionality of the searches conducted by appellees determined that those searches were violative of the law existing at the time the searches were instituted.* Each of these courts found that the searches were not administrative searches governed by the exception to the warrant clause carved out by Frank v. Maryland, supra and that, in fact, Frank gave the appellees no authority to conduct these searches. The New York Court of Appeals in People v. Laverne, supra** reversed appellants' criminal conviction and held that unlike Frank v. Maryland, supra,

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*Judge Tenney also determined that these searches "amounted to an unconstitutional search and seizure under the judicial authority then existing . . ." (A. at 37).

**The State never sought to have this decision reviewed in the Supreme Court of the United States.

> . . . we do not have before us a search leading to a summary administrative action or civil proceedings to preserve health or public safety, but rather official searches of private premises without warrants which have become the bases of criminal prosecutions and conviction.
> (A. at 123)

And the Court went on to hold that the searches were illegal because made for the purpose of criminal prosecutions.

> We are of opinion that the searches by the public officers of defendant's home without warrants for the purpose of criminal prosecutions were to that extent in violation of his constitutional rights.
> (A. at 123)

Likewise the Appellate Division in reversing appellants' contempt convictions, Incorporated Village of Laurel Hollow v. Laverne Originals, Inc., 24 A. D. 2d supra at 618, held that the searches were unlike those conducted in Frank v. Maryland, supra and Eaton v. Price, supra, and, therefore, that the evidence had to be excluded as unlawfully obtained.

This decision was affirmed by the Court of Appeals which found that the evidence utilized in the contempts "was obtained in the same way as that considered" in its decision reversing the criminal convictions. Incorporated Village of Laurel Hollow v. Laverne Originals, Inc., 17

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*The Court reasoned that contempt proceedings were quasi-criminal in nature and governed by the exclusionary rule. Id. at 618.

N. Y. 2d 900 (1966).*

And the Appellate Division reversed the penalty judgments because the evidence was unlawfully obtained. Incorporated Village of Laurel Hollow v. Laverne Originals, Inc., 24 N. Y. 2d supra at 615.**

The principles governing collateral estoppel are well established. As the Supreme Court stated in United States v. Munsingwear, Inc., 340 U.S. 36, 38 (1950):

> E ven if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties of their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.

See also, United States v. Kramer, 289 F. 2d 909, 913 (2d Cir., 1961);*** Lynch v. Commissioner of Internal Revenue, 216 F. 2d 574 (7th Cir., 1954).

The issue "once so determined" by the courts of New York is that these searches were for the purpose of criminal prosecution and not for purposes permitted under Frank v. Maryland, supra and Eaton

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*The Village never sought review of this decision in the Supreme Court.

**Again the Court reasoned that suits for a penalty were quasi-criminal in nature. The Village never appealed this reversal.

***Judge Friendly stated that collateral estoppel operates to establish conclusively both matters of fact and law for the purpose of a later law suit even on a different cause of action. United States. Kramer, supra at 913.

v. Price, supra. This finding, necessary to the determination of the cases in the New York courts, arose in the context of criminal prosecutions. The Lavernes claimed that the evidence used to convict them was the product of illegal searches. Had the New York courts found that the searches were instituted for the purposes permitted under existing judicial authority, e.g., Frank v. Maryland, supra, appellants' convictions for disorderly conduct and contempt and the judgment for penalties would have been affirmed.*

That these findings of the New York courts were made in the context of criminal cases does not give appellees the right to relitigate the same issues in a civil case. Findings actually litigated and determined in criminal cases can, depending upon the burden of proof, be used in civil cases. Coffey v. United States, 116 U.S. 436, 442-43 (1886); Dalma v. Powers, 295 F.Supp. 924 (N.D.Ill., 1969).

For example, acquittals cannot be used by defendants for purposes of collateral estoppel because an acquittal only proves that the government did not prove its case beyond a reasonable doubt and the burden of proof in a civil case, a preponderance of the evidence, is not as great.**

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*A reading of the opinions of these courts demonstrates that the validity of the searches was litigated in the New York courts. For example, in the criminal prosecution for disorderly conduct the Village officials testified regarding the searches and appellants objected to this testimony on constitutional grounds (A. at 124).

**For example, suppose a defendant is acquitted of the crime of income tax evasion. In a subsequent civil case brought to collect (continued next page)

But the use of an acquittal for collateral estoppel purposes is totally unlike the situation here.* The State cases were reversed on the basis of findings that the evidence had been seized illegally. The burden of proving that evidence is seized illegally is on the defendant and that burden is to prove the illegality by a preponderance of the evidence. People v. Merola, 30 A.D.2d 963, 294 N.Y.S.2d 301, 304 (2d Dept., 1968); People v. Entrialgo, 19 A.D.2d 509, 510-11, 245 N.Y.S.2d 850, aff'd 14 N.Y.2d 733 (1964).

Clearly, once the Lavernes proved in the State courts by a preponderance of the evidence that these searches were undertaken for purposes of criminal prosecution and contrary to their existing judicial authority, these findings precluded the appellees from proving the contrary in a subsequent civil case. Yet this is precisely what occurred in this trial.

These principles of collateral estoppel apply equally to federal courts when the State court findings are on federal constitutional issues, e.g., Robb v. Connoly, 111 U.S. 624 (1884); Hanna v. Home Insurance Co., 28 F.2d 298, 303 (5th Cir., 1960); cf. Angel v. Bullington, 330 U.S. 183

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unpaid taxes collateral estoppel would not lie because the government could recover the taxes by proving its case by a preponderance of the evidence.

*As Judge Tenney found, appellants: "are not trying to introduce into evidence at trial court's acquittal which, of course, would be inadmissible since it could merely indicate at best, that the Government had proven its case only by preponderance of the evidence and not beyond a reasonable doubt." (A. at 39)

(1947). And collateral estoppel is fully applicable to civil rights action brought under Section 1983. Preiser v. Rodriguez, 411 U.S. 475, 497 (1973). And a number of courts have specifically held that a federal court may not relitigate the search and seizure question in the different context of a damage action. See, e.g., Palma v. Powers, 295 F.Supp. 924 (N.D.Ill., 1969); Moran v. Mitchell, 354 F.Supp. 86 (E.D.Va., 1973).

Yet appellees were permitted to assert, contrary to the decision of the New York courts, that these searches were not for the purpose of criminal prosecution, but were valid administrative searches. Only if these appellees were not bound by the New York decisions should such relitigation of the issue have been permitted.

But collateral estoppel is binding not only upon the parties who litigated the prior suit but upon all people in privity with them. Southern Pacific Railroad Co., v. United States, 168 U.S. 1, 48 (1898). The State court proceedings were brought against the Lavernes, both by the State of New York and the municipality of Laurel Hollow.* It is hornbook law that when a suit is binding upon the sovereign it binds the subordinate official of the sovereign. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 403 (1940). Thus, as subordinate officials the Mayor, Building Inspector and Trustees are bound by the decisions

*A judgment against the state binds a municipality, Reynolds v. Sims, 377 U.S. 533 (1964). A municipality is merely an agency of the state. LaGuardia v. Smith, 281 N.Y. 1 (1942).

against the sovereign.

There is no merit to the argument that these officials are being sued personally and, therefore, that the rule of privity for subordinate officials is inapplicable to them. These appellees are being sued for actions they took as public officials. And, in fact, a cause of action under the Civil Rights Act only exists if it is alleged they acted under color of state law. The Lavernes do not claim, nor could they claim, that these appellees violated their constitutional rights in their private capacity as citizens. It is only the recovery only that is personal against the appellees; the cause of action is against them for acts they undertook as public officials. As such officials they are bound by the decisions of the state courts as to the unconstitutionality of their actions.

The cases of Moran v. Mitchell, supra, and Gatling v. Midgett, mem. decis. No. 14, 1863 (4th Cir., 1971) hold that public officials sued for illegal searches under the Civil Rights Act are in privity with the state that initially brought the criminal prosecution. In Moran v. Mitchell, supra, the court, in language dispositive of the issue, stated:

> While a criminal action is brought in the name of the State, all of the law enforcement officers who work toward the prosecution are, in essence, parties to the action. The litigation is, in a very real sense, between them and the defendant. (Id. at 89)

The rationale of these cases is that a motion to suppress evidence in a criminal case directly attacks the conduct of the public officials

and, thus, establishes the sort of advocacy that is normal in situations where res judicata applies.* Moran v. Mitchell, supra at 89.

In the State courts the Lavernes objected on constitutional grounds to the introduction of the public officials' testimony. This directly attacked the conduct of appellee public officials who participated in, or worked toward the criminal prosecutions.** Common sense and collateral estoppel require that these public officials not be permitted to relitigate an issue determined against them in the State courts.

The policies behind res judicata -- and end to litigation and limited court resources -- would best be served by this Court finding that the public officials in this case were precluded from relitigating an issue foreclosed by decisions in the State courts. These State court findings require the entry of judgment for the Lavernes.

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*The following language from the Court's opinion in Gatling v. Midgett, supra, is particularly appropriate: " T he parties here are in substance the same as those in the state criminal proceeding, for the state officers named here are those engaged in the prosecution, in the name of the state, of the state criminal proceeding. Compare Ex Parte Young, 209 U.S. 123 (1908). But even if thought to be different the trend is away from requiring identity of parties as a prerequisite to collateral estoppel. See, e.g., Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971)." Quoted with approval in Moran v. Mitchell, supra at 89.

**In People v. Laverne, supra the Lavernes objected to the introduction on constitutional grounds of the observations by the public officials (A. at 124).

POINT III

THE EVIDENCE AT TRIAL WAS INSUFFICIENT TO ESTABLISH THAT APPELLEES HAD A REASONABLE BASIS FOR BELIEVING THAT THE SECOND AND THIRD SEARCHES WERE WITHIN THE NARROW EXCEPTION TO THE WARRANT CLAUSE CARVED OUT BY FRANK v. MARYLAND, SUPRA.

At the time the searches of October 18 and December 17, 1962 occurred Frank v. Maryland, supra permitted warrantless searches only "to determine whether conditions existed" which various municipal ordinances proscribed. Id. at 366. Searches conducted under Frank, to be legal, could not lead directly to criminal prosecutions nor could one of their purposes be to gather evidence for criminal prosecutions. Id. at 362,·366. Thus, for appellees to prove that their actions were "reasonably based upon the state of the law at the time" the searches took place, they had to convince the jury that the searches fit within the narrow exception to the warrant clause carved out by Frank v. Maryland, supra. Preston v. Cowan, supra at 20.

Viewing the facts presented at trial most favorably to the appellees leaves no doubt that the searches of the Lavernes' home conducted upon October 18 and December 17, 1962 were not "merely to determine whether conditions exist which the [Building Zone Ordinance] proscribes," but were instituted to seize evidence to be used in criminal prosecutions.

Frank v. Maryland, supra at 366.* No jury could reasonably conclude otherwise and appellants were entitled to a directed verdict that appellees had no reasonable basis for believing the searches valid.

After the first search of the Laverne home in July the Building Inspector submitted a report to the Mayor and the Trustees (A. at 159). The Mayor testified that he felt the report indicated a violation of the Village ordinance (T. at 120).**

At the Trustees' meeting on September 29, 1962 the Laverne premises and the Building Inspector's report were discussed (T. at 121-27). The Mayor testified that the discussion concerned two problems; one was a possible violation of a village ordinance and the other was that

> we were faced with a contempt action on the part of Laverne Originals in contempt of the injunction issued in 1954.
>
> (T. at 127)

On the basis of this discussion the Trustees authorized the second search of the Laverne premises. It would be blinking at reality to say that this second search was "merely to determine whether conditions

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*To be illegal the searches need not have been solely for the purpose of finding evidence to be used in criminal prosecutions. If such a purpose was one of the reasons for searches they were prohibited by the Fourth Amendment. Frank v. Maryland, supra, only made an exception for searches that were solely administrative and would lead to correction orders, not criminal prosecutions.

**The Mayor reached this conclusion despite his lack of knowledge as to the contents of an industrial designer's studio.

existed" which the zoning ordinance prosecribed, and did not have as one of its purposes the gathering of evidence for a criminal prosecution, or a contempt action.* This discussion regarding contempt and the violation of the ordinance clearly implied that if evidence were found at the Lavernes' home confirming the Building Inspector's report some sort of criminal action would be taken against the Lavernes.

Moreover, once the Building Inspector had found what he felt were violations of the ordinance a procedure was provided for having these violations corrected. Section 10.2(b) of the Ordinance provides for the sending of a notice to abate any violations found by the Inspector (A. at 138).** Had appellees only contemplated civil corrective action regarding these alleged violations they would have employed the notice procedures provided and there would have been no reason for the second search. That appellees did not do so and instead instituted various criminal actions is a strong indicator as to the purposes of the second search.

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*The action for contempt in this case were quasi-criminal proceedings where as the Court held in Incorporated Village of Laurel Hollow v. Laverne Originals, Inc., 24 A.D.2d 615 (2d Dept., 1965), illegally seized evidence is excludable because the "individual defendants were subject to imprisonment." Id. at 618.

**However, the ordinance, unlike that in Frank v. Maryland, supra, provides for immediate criminal prosecution of any violator even without the sending of a notice to abate (A. at 138). No such notice to abate was sent to the Lavernes. Incorporated Village of Laurel Hollow v. Laverne Originals, Inc., supra at 616.

Nor was any contact made with the appellants prior to the second search. They were neither asked to permit an inspection nor to remove any items appellees felt offended the village ordinances (T. at 98, 182, 240). Additionally, photographs of appellants' home were to be taken as evidence in the two types of criminal proceedings contemplated prior to the search and initiated immediately afterwards.

The swiftness with which criminal proceedings were brought after the second search confirms the nature of that search. On October 22, 1962, four days after the search the Trustees unanimously requested the Village Attorney "to seek an order punishing the defendants in the Laverne case for contempt" (A. at 167-68). On November 14, 1962 the Building Inspector signed the affidavits used in the contempt proceedings (T. at 73).

And approximately three weeks after this second search the Inspector signed criminal informations against the appellants at the local police justices (T. at 72).

Nor can it be reasonably contended by appellants that the third search of December 17, 1962 was merely an administrative search and not for the purpose of gathering evidence. The stated purpose of this search by appellees themselves was to gather evidence for use against appellants in the quasi-criminal contempt proceedings.

The Building Inspector who made this search testified that on the evening of December 16, 1972 he received a telephone call from the

Village Attorney who told him the Court had found against the Lavernes and they must cease their activities (T. at 62-63). He told the Inspector to make an inspection of the house and see if the activities had been stopped (T. at 62-63).

In other words, the Building Inspector was to search the appellants' home to see whether or not they were in violation of court order. Obviously a violation of a court order can lead to a fine or jail. It is difficult to imagine any evidence that could more clearly indicate that a search was being carried out which has as its purpose the gathering of evidence to be used in criminal proceedings.

And such evidence was gathered on that search and used in various criminal proceedings against the Lavernes.

The Building Inspector took photographs of the inside of the house. (T. at 65). On the basis of this evidence the Village instituted a third criminal prosecution against the Lavernes, another contempt proceeding and a penalty action (T. at 165-68, 212-15).

That the searches of October 18th and December 17th had as a purpose the gathering of evidence to be used in criminal cases cannot be disputed from the facts set out. These two searches had nothing in common with those searches made in Frank v. Maryland, supra. Thus, the searches of October 18th and December 17th, 1962 were illegal under Supreme Court law at the time they were undertaken. Appellees' belief in the constitutionality of their actions was not "reasonably based upon

the state of the law in effect at the time the actions took place."
Pierson v. Cowan, supra at 20. Appellants were entitled to a directed verdict that the appellees failed to meet their burden of proving that their good faith beliefs were reasonably held.

POINT IV

THERE WAS NO EVIDENCE FROM WHICH A JURY COULD PROPERLY FIND THAT THE MAYOR AND DEPUTY MAYOR HAD A REASONABLE BASIS IN LAW FOR BELIEVING THEIR WARRANTLESS SEARCHES OF THE LAVERNES' HOME WAS VALID

At trial the Mayor and Deputy Mayor had to prove that they had a reasonable basis for their good faith belief in the validity of the search conducted of appellants' home on October 18, 1962. The question of whether they had such a reasonable basis is judged objectively; the issue is whether their good faith belief "was reasonably based upon the state of the law in effect at the time their actions took place." Preston v. Cowan, supra at 20; Point II, supra.

No evidence was introduced at trial from which the jury could have properly found that the Mayor and Deputy Mayor had such a reasonable basis for believing they had the legal authority to search the Lavernes' home. Appellants' motions for a directed verdict or for judgment notwithstanding the verdict should have been granted (T. at 459, 602).

First, the Mayor and Deputy Mayor claimed that Section 10.1 of the Building Zone Ordinance gave them authority to search the Lavernes' home (T. at 295, 297). This ordinance provided that the "Building Inspector in the discharge of his duties shall have authority to enter any building or premises at any reasonable hour" (A. at 137). It is hornbook law that a privilege or authority from the government is a defense to a

trespass only for authorized acts by authorized persons. Restat. 2d, Torts, Section 211; C.J.S. Trespass, Sections 53-54; cf. Walker v. State of Georgia, 417 F.2d 5 (5th Cir., 1969).

A privilege given by statute is confined to the persons to whom it is given. The actor's status is material in determining

> . . . whether the duty or authority to which is attached the privilege to enter land is conferred upon the actor. Thus, under a statute providing that impure foods may be destroyed by the local health officers. the privilege of entry in order to perform his public duty is confined to them. (Restat. 2d, Torts, Section 211(d); emphasis added)

The privilege given by Section 10.1 of the Building Zone Ordinance is confined to the Building Inspector; it gave no authority to the Mayor or Deputy Mayor to enter appellants' home and search their premises.

The next "authorities" the Mayor and the Deputy Mayor relied upon were their duties as the chief and deputy chief executives to see that the law was enforced (T. at 128, 190, 226). This claimed legal basis was repudiated by appellees' expert who testified that in their capacities as Mayor and Deputy Mayor they had no authority to search the Lavernes' home (T. at 307-08). Obviously, executive officers cannot, simply because of their duties to enforce the laws, take on functions specifically given by statute to subordinates. If so the specific grants of authority such statutes contained would be meaningless.*

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*For example, it cannot reasonably be argued that the President of the United States could, because of his duty to enforce the law, take on the functions of a Department of Agriculture subordinate and destroy a racehorse.

Appellees' expert, also, testified that if the Board of Trustees authorized the Mayor and Deputy Mayor to temporarily act as Building Inspectors, this would have given them a reasonable legal basis for believing the searches valid (T. at 306, 308-09). However, he continued, the matter of whether such authority had been given to the Mayor and Deputy Mayor had not been discussed with him(T. at 309).

And, indeed, the record indicates that no such authority to act as Building Inspectors was ever given by the Board of Trustees to the Mayor or Deputy Mayor. In fact, the Mayor was not even authorized by the Board to undertake the search and decided to do so only after the Board meeting (T. at 129-30). Nor is there any indication that the Trustees in authorizing the Deputy Mayor to search the appellants' home authorized him to do so as a building inspector (T. at 129).*

Finally, appellees' expert claimed that if the Mayor and the Deputy Mayor were acting cooperatively with the Building Inspector this would given them a reasonable legal basis for believing the searches valid (T. at 309-10). There is no legal authority supporting this proposition.

The ordinance confines the authority to search homes to the Building Inspector. It does not say others can cooperate with the Building Inspector and also search homes. The authority given under such

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*As there was no authority to authorize the Deputy Mayor to search appellants' home that authorization by the Trustees makes them liable as joint trespassers. A joint trespasser is anyone who encourages, commands or directs another to commit a trespass. C.J.S., Trespass Section 2.

ordinances is restricted to authorized persons. Restat. 2d, Torts Section 211(d). Presumably the Building Inspector is given this privilege because of his expertise and knowledge regarding enforcement of the ordinance. A Mayor and Deputy Mayor not having such expertise should not be permitted to engage in such searches. The security of the home against unwanted intrusions is one of our basic liberties; a narrowly drawn statute written in derogation of this liberty should not be expanded to include others not within its terms.

Additionally, not a shred of proof was introduced at trial indicating that the Building Inspector requested the Mayor and Deputy Mayor to assist him with his duties. In fact the Mayor and Deputy Mayor claimed they searched the Lavernes' home in their capacities as Mayor and Deputy Mayor and not to assist the Building Inspector (T. at 128, 190, 226).

Thus, no proper evidence was introduced from which the jury could conclude that the Mayor and Deputy Mayor had a reasonable basis in law for holding a good faith belief that the searches they conducted were valid. Appellants were entitled to a directed verdict or judgment notwithstanding the verdict.

POINT V

THE TRIAL JUDGE'S REFUSAL TO (a) ANSWER THE JURY'S QUESTION REGARDING THE PERTINENCE OF THE BUILDING INSPECTOR'S INVITING THE ARCHITECT TO SEE THE LAVERNE HOME AND (b) TO CHARGE THAT THE BUILDING ZONE ORDINANCE DID NOT GIVE THE MAYOR AND DEPUTY MAYOR A REASONABLE BASIS IN LAW FOR THE SEARCHES REQUIRE THE GRANTING OF A NEW TRIAL.

(a) The jury deliberations began early Friday afternoon (A. at 93-94). Late that afternoon the Judge called the jury back and told them that unless they reached a verdict by 6:00 p.m., or shortly thereafter, he would send them home for the weekend (A. at 94). In the colloquy that ensued the forelady of the jury informed the Judge that the jury had "come to a deadlock about one question" (A. at 94). The jury was sent out to formulate the question (A. at 95).

At 6:00 p.m. a note from the jury was received which read as follows:

> The fact that the building inspector invited the architect to go on the premises and failed to identify himself as soon as possible, is this pertinent to the decision.
>
> (A. at 95)

The Judge then proceeded to instruct the jury in a manner that totally failed to answer a substantial portion of the jury's question (A. at 95-97). Over appellants' objection he refused to give additional instructions (A. at 98). Within ten minutes of the Judge's instruction the jury returned a verdict in favor of the Building Inspector.

The question about which the jury was deadlocked contained two

separate questions. First, it concerned the pertinence to their decision of the Building Inspector's inviting the architect onto appellants' premises and second, it concerned the pertinence of the failure of the Building Inspector to identity himself as soon as possible. The Judge's entire answer to the jury limited itself to the second half of the question which concerned the architect's failure to identity himself (A. at 95-97). He said nothing, despite the obvious pertinence to the jury's decision, of the Building Inspector's inviting the architect into the Lavernes' home.

After "answering" the jury's question the Judge held a conference at the side bar. Appellants' counsel requested the Judge to answer the other half of the jury's question:

> I would request that your Honor indicate that the question of whether he identified himself when he came in and the fact that the architect accompanied him may be considered in determining whether, when he came in his state of mind was, he was coming in as the building inspector or on the tour. (A. at 97-98)

The Judge responded: " T hat is not the question they asked me. Declined. You have your exception" (A. at 98).

The Judge erred in ruling that the jury's question was not concerned with the relevance of the Building Inspector's invitation to the architect. The question specifically asked about the pertinence of the invitation. And the pertinence is precisely as appellants requested the Judge to charge. The invitation to the architect bears directly on the issue of whether the building inspector entered the premises to undertake an inspection or to simply view what he called an "unusual building" (T. at 50).

From the Building Inspector's testimony the jury could have found that his state of mind when he entered appellants' home was for the purpose of showing the architect the house and not to inspect it pursuant to the ordinance. On direct examination he testified as follows:

> Mr. Cantelli is an architect or was an architect and builder. I was riding from his construction work in the Village down to the Village Hall to dig out some information at the time. I went by the Laverne property on this date. He being an architect I thought would be interested in the unusual building, and I said come on, take a look at it. It's very historical.
>
> (T. at 50)

And on cross-examination the Building Inspector appeared unsure as to whether he entered the Laverne house to show it to the architect or to check it for zoning violations.

> Q. At the time you entered the premises with the architect you had a discussion about it being an interesting building?
> A. Yes.
> Q. At the time you entered the premises, Mr. Johnson, did you have in your mind any question about a violation on those premises?
> A. I would say yes.
> Q. When you discussed this, that this was an interesting building, with the architect, did you discuss with the architect that you wanted to go in to check whether there was a violation?
> A. I can't recall whether I said that or not. That might have been an excuse for it. I don't know.
>
> (T. at 76)

Earlier in the trial, the Judge had recognized that the Building Inspector's invitation to the architect had a bearing on his state of mind

and had so charged the jury (A. at 70-71).*

But now after some five hours of deliberations the jury had stated it was deadlocked on this very issue. Yet, the Judge refused to instruct them regarding its pertinence. An instruction that the invitation was pertinent to the Building Inspector's state of mind could well have made the difference in the verdict. Obviously the jury was undecided and troubled by the invitation to the architect; the refusal of the Judge to answer their question substantially prejudiced the rights of the appellants. This failure requires that the verdict in favor of the Building Inspector be set aside and a new trial ordered.

(b) In Point IV, supra, appellants argue that they were entitled to a directed verdict because there was no reasonable basis in law upon which the Mayor and Deputy Mayor could have a belief that the searches they conducted were lawful. That Point establishes that Section 10.1 of the Building Zone Ordinance did not give them any valid authority to conduct the searches.

At a minimum, and assuming arguendo appellants were not entitled to a directed verdict on this issue, the Judge should have charged, as appellants requested,* that the Building Zone Ordinance gave no authority

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*Appellants requested the following charge: "You may not use the provisions of the local ordinance which refer to the authority of the Building Inspector to enter buildings as a basis for finding that any defendant, other than Johnson, may have reasonably believed that the ordinance gave any other defendants an authority to enter any building." Appellants' Request No. 16, Record on Appeal.

to any appellee, other than the Building Inspector, to conduct a warrantless search of the premises (T. at 475-76) Restat. 2d Torts, Section 211(d); C.J.S., Trespass Sections 353-54.

Instead, the Judge charged the jury that they could consider all of the evidence in deciding whether the Mayor or Deputy Mayor had a reasonable basis in law for the searches (A. at 75). This failure to charge as appellants requested was not harmless error.

The issue of whether there was any legal authority for the Mayor and Deputy Mayor to engage in a warrantless search of appellants' home was material to the outcome of this case. Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, supra. Appellees' entire defense rested upon proving that such legal authority existed. The failure to give the requested instruction improperly permitted the jury to rely on an ordinance that, in fact, gave no authority to the Mayor and Deputy Mayor. Yet it is highly probable that consideration of this ordinance by the jury, considering the testimony at trial, contributed substantially to their findings that the Mayor and Deputy Mayor had a reasonable basis in law. An error of such a prejudicial nature requires the granting of a new trial.

POINT VI

THE EXCLUSION OF EVIDENCE DEMONSTRATING THAT APPELLEES DID NOT HAVE A REASONABLE BASIS FOR BELIEVING THAT THE LAVERNES WERE IN VIOLATION OF THE ZONING ORDINANCE AND THE INJUNCTION REQUIRES THE GRANTING OF A NEW TRIAL.

Appellees were required to establish that they had a good faith reasonable belief in the lawfulness of their actions and that their actions were proper under all the circumstances (A. at 69, 71, 82, 90). To satisfy the jurors that their actions were proper it was obviously relevant for appellees to introduce evidence showing that there was a reasonable basis for believing the Lavernes were in violation of the ordinance.

For example, if on the basis of what the Building Inspector saw on his first search it was reasonable for him to conclude that the Lavernes were running a factory, his report to that effect, and his subsequent searches were "proper." However, if on that first search he did not see enough to lead him "reasonably" to the conclusion that appellants were running a factory, or in violation of the ordinance, his report and the further searches of appellants' home would have been improper.*

And similarly, it was relevant for appellants to show that there was

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*Likewise, if the Mayor, Deputy Mayor and Trustees did not have enough evidence to reasonably believe that appellants were violating the ordinance, their actions in authorizing the prosecutions and searches would have been improper.

not a reasonable basis for appellees' belief that they were running a factory and that, therefore, the searches and prosecutions were improper. The Judge agreed to the relevance of the appellees introducing evidence as to the basis for their belief that the Lavernes were in violation of the ordinance and the injunction; and he found it relevant for the Lavernes to show that there was no reasonable basis for appellees' belief.*

Thus, on cross-examination of the appellees it was brought out that neither the Building Inspector nor the Mayor had ever been inside the studios of industrial designers and that he had no idea what one looked like (T. at 100, 180). And the Inspector testified that he did not see the men at the house doing art work, but only saw them cleaning up the results of a flood (T. at 87). Moreover, the Inspector had only saw 15 to 20 rolls of paper, 10 to 15 silk screens and 25 cans of paint (T. at 90-93).

On direct examination appellants testified that since 1954 they had not used their home as a factory, but had only used it as a studio for their art and design work (T. at 415, 426-32).

As part of their proof that it was unreasonable for appellees to believe their home was a factory, appellants desired to put in evidence of facts demonstrating the nature of a factory that produced wallpaper, fabrics and furniture (T. at 432-33). Appellants, in fact, had such a factory and

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*He charged the jury: "The extent or lack of the actual violation can only be relevant, if you find it so, to the question of defendants' reasonable good faith . . ." (A. at 71). The Judge went on to give an example (A. at 71-72).

knew the nature of it. This evidence would have shown that a factory operation was significantly different from that seen by the appellees in the Laverne home (T. at 449-51).

For example, the evidence would have shown:

> . . . that the tables in a manufacturing operation have a steam heat that goes underneath it so as to cure the paper. That was not the tables, the long tables at Laurel Hollow. They had no such implements, no such equipment.
>
> So that it was not a manufacturing table, and anybody who knew anything about the manufacture of wallpaper would have known that you needed that equipment to cure wallpaper that is handled on long tables.
>
> . . . I think it's also relevant to show to the jury what the factory operation of wallpaper would have been; that the offer of proof would have shown, from what I understand from Mr. Laverne, approximately 5,000 to 10,000 rolls of paper as opposed to whatever it was, 50 or 80 rolls at Laurel Hollow. It would have shown 800 cans of paint.
>
> (T. at 450-51)

This evidence was excluded by the Judge who ruled that it was "irrelevant what a factory does unless you can show that the defendant knew it" (T. at 452). The Judge was in error in so ruling. If a factory looked totally differently than what appellees saw at the Laverne house, it could be concluded by the jury that the appellees were unreasonable in thinking the Lavernes were running a factory. The evidence was both relevant and probative on the issue of whether it was proper to make the searches of appellants' home.

As the offer of proof would have been of value to the jury in determining the issues in the case and might have changed the result, its exclusion requires the granting of a new trial.

CONCLUSION

FOR ALL OF THE ABOVE REASONS JUDGE KNAPP'S DECISION DISMISSING THE COMPLAINT SHOULD BE REVERSED AND THE CASE REMANDED TO THE DISTRICT COURT FOR A DETERMINATION OF DAMAGES OR, ALTERNATIVELY, A NEW TRIAL SHOULD BE GRANTED.

Dated: New York, New York
September 25, 1974

Respectfully submitted,

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Service of three (3) copies of the within Brief is hereby admitted this day of

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